This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0837

In the Matter of the Determination of the Need for an Environmental Impact Statement for the Minntac Mine Extension Project in Mountain Iron, St. Louis County, Minnesota

Filed January 27, 2014
Affirmed
Connolly, Judge

Minnesota Department of Natural Resources

Kathryn M. Hoffman, Minnesota Center for Environmental Advocacy, St. Paul, Minnesota (for relator Minnesota Center for Environmental Advocacy)

Lori Swanson, Attorney General, Jill Schlick Nguyen, David P. Iverson, Assistant Attorneys General, St. Paul, Minnesota (for respondent Minnesota Department of Natural Resources)

Rob A. Stefonowicz, Peder A. Larson, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for respondent/intervenor United States Steel Corporation)

Considered and decided by Connolly, Presiding Judge; Schellhas, Judge; and Klaphake, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges the Minnesota Department of Natural Resources' (MDNR) findings of fact, conclusions of law, and order, arguing that (1) MDNR erred by failing to compare the proposed mining operations with the reclamation process that would occur if the extension were not approved, (2) MDNR erred by relying on a National Pollutant Discharge Elimination System (NPDES) permit and a state permit to mine as measures to mitigate potential environmental effects, and (3) MDNR has a conflict of interest because it is charged with both promoting mining and protecting the environment. We affirm.

FACTS

U.S. Steel's Minntac Mine is a taconite mining and processing operation in Mountain Iron, Minnesota. It became operative in 1967 and has been expanded on two occasions.

The Minntac facility includes an open-pit taconite mine, crushing plant, concentrating plant, agglomerating plant, a water reservoir, tailings basin, and other associated equipment. The tailings basin is an 8,000 acre lake situated between the Dark River and Sandy River Watersheds. It is used to dispose of mineral processing waste. Pollutants, such as sulfate and water hardness, have concentrated in the tailings basin water. The tailings basin leaks into the watersheds, and this leakage has led to elevated levels of sulfate and hardness in the Dark River and Sandy River watersheds. The Dark River exceeds state water-quality standards for sulfate, hardness, specific conductance,

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and manganese. The Sandy River also exceeds water quality standards for sulfate, chloride, hardness, and specific conductance.

A. Regulations and Permits

The Minntac facility currently operates under several permits and regulations. MDNR issued U.S. Steel a permit to mine in 1983; the permit has been amended on several occasions. The "conditions of this permit apply to all mining and reclamation activities conducted from August 25, 1980 until the ores identified in the permit application are depleted." Pursuant to this permit, the "operating life of the [e]ast and [w]est pits of Minntac is projected to be at least 70 years." The permit to mine was amended in 1997 and applies to all mining and reclamation activities conducted at the west pit from September 1997 until "the ores identified in the permit amendment application are depleted."

The Minntac facility also operates subject to NPDES Permits issued by the Minnesota Pollution Control Agency (MPCA). NPDES Permits are issued pursuant to the federal Clean Water Act and govern discharges into navigable waters. *See* 33 U.S.C. § 1342 (2012); Minn. R. 7001.1020, subp. 19 (2011). The NPDES permit for Minntac's tailings basin has a requirement "specifically designed to achieve a 'no net increase' in mass loading of sulfate and calcium to the tailings basin." Since 2004, Minntac has been out of compliance with chapter 4, sections 3.1 and 3.2 of this permit, which regulates sulfate and calcium requirements. Based on this noncompliance, Minntac and MPCA entered into a schedule of compliance (SOC) on June 9, 2011, to "reduce air quality emissions and water quality pollutant discharges and resolve outstanding water quality

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non-compliance at the Minntac tailings basin." These requirements are currently being implemented.

The SOC was amended in February 2013. The amendment indicates that Minntac has complied with the SOC by submitting a dry control effectiveness report to MPCA and installing monitoring wells to determine whether the sulfate concentration in the groundwater is in compliance with the applicable standard. The current SOC contains additional requirements to resolve the water-quality issues in the tailings basin. Minntac has complied with these requirements.

B. Proposed Extension

U.S. Steel proposed the Minntac Mine Extension (the extension), which would expand the current mining operation by approximately 483 acres. The extension would extend the east pit to the south by 235.8 acres and the west pit to the south by 247.2 acres. "The proposed project would not affect operation of the ore processing facility or the annual rate of production, but would extend the operational life of the facility." The Minntac facility is currently scheduled to close in 2015. The extension would extend the expected life of the facility through 2031.

The existing tailings basin would accommodate all waste produced from the proposed pit expansions. The proposal does not call for an extension of the tailings basin, but the height of the basin would be raised by 70-90 feet to accommodate additional tailings.

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C. The Environmental Assessment Worksheet

Under rules adopted pursuant to the Minnesota Environmental Policy Act (MEPA), an environmental assessment worksheet (EAW) was required for the extension proposal. Minn. R. 4410.4300, subp. 11(B) (2011) (requiring that an EAW be prepared by MDNR for expansions of a mine by 320 acres or more). In August 2012, MDNR, acting as the responsible governmental unit (RGU), published an EAW for the extension. In the EAW, MDNR acknowledged "that sulfate levels in the tailings basin have become problematic for seepage discharged to the environment." It further explained that the "existing [sulfate compliance] situation is not anticipated to be appreciably affected by the proposed mine extension project," and that the sulfate issue will be addressed through "ongoing water quality permitting, whether or not the proposed extension project is implemented. . . . Because production rates will remain the same, potential future increases in sulfate levels in the tailings basin are not anticipated."

The EAW was subject to a public-review-and-comment period. During this 30-day period, MDNR received more than 200 comments. Relator Minnesota Center for Environmental Advocacy (MCEA) submitted a written comment addressing its concerns about the extension. On April 11, 2013, MDNR issued its findings of fact, conclusions of law, and order. After considering the record and the submitted comments, MDNR determined that an environmental-impact statement (EIS) was not required for the extension because the project does not have the potential for significant environmental effects. MDNR determined that any potential environmental effects are subject to mitigation by ongoing public regulatory authority.

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DECISION

"A person aggrieved by a final decision on the need for an environmental assessment worksheet [or] the need for an environmental impact statement . . . is entitled to judicial review of the decision . . . ." Minn. Stat. § 116D.04, subd. 10 (2012). We evaluate "whether the RGU took a hard look at the salient issues, but defer to the RGU's decision unless the decision reflects an error of law, is arbitrary and capricious, or is unsupported by substantial evidence." *Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 381 (Minn. App. 2009) (quotation omitted). An agency's decision is arbitrary and capricious if the agency

> (a) relied on factors the legislature never intended it to consider, (b) entirely failed to consider an important aspect of the problem, (c) offered an explanation for the decision that runs counter to the evidence, or (d) rendered a decision so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Watab Twp. Citizen Alliance v. Benton Cnty. Bd. of Comm'rs, 728 N.W.2d 82, 89 (Minn. App. 2007), *review denied* (Minn. May 15, 2007). "Substantial evidence consists of: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than 'some evidence'; (4) more than 'any evidence'; and (5) evidence considered in its entirety." *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (quotation omitted). A party challenging an RGU's decision has the burden of proving that its findings are unsupported by the evidence as a whole. *Friends of Twin Lakes*, 764 N.W.2d at 381.

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I.

Relator first argues that MDNR's EAW for the extension fails to properly evaluate the potential for significant environmental effects because it compares the environmental effects to the impacts of existing Minntac operations. Relator claims that the EAW should have compared the impacts of the extension against the environmental conditions that would exist if the Minntac facility closed and the site was reclaimed.

An EAW is "a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action." Minn. Stat. § 116D.04, subd. 1a(c) (2012). In deciding whether a project has the potential for significant environmental effects, the RGU considers the following factors:

> A. type, extent, and reversibility of environmental effects;
>
> B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;
>
> C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; and
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> D. the extent to which environmental effects can be anticipated and controlled as a result of other available

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> environmental studies undertaken by public agencies or the project proposer, including other EISs.

Minn. R. 4410.1700, subp. 7 (2011). The EAW Guidelines note that "[t]he third criterion is frequently the main justification for why an EIS is not required. Projects often have impacts that could be significant if not for permit conditions and other aspects of public regulatory authority." Minn. Envtl. Quality Bd., *EAW Guidelines: Preparing Environmental Assessment Worksheets* 3 (Feb. 2000). "Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit." Minn. Stat. § 116D.04, subd. 2a (2012).

Relator claims that, because the "major governmental action" is MDNR's approval of the extension, the EAW should have used the potential reclamation of the Minntac facility in 2015 as a no action alternative. Contrary to relator's contention, MDNR did respond to relator's comment concerning alternatives. It stated, "The EAW process does not evaluate project alternatives. State environmental review only requires evaluation of alternatives as part of an EIS."

Furthermore, relator's argument apparently conflates the standards for an EAW and an EIS. Under Minnesota law, an EIS must discuss alternatives to the proposed project, including "no action" alternatives. Minn. R. 4410.2300(G) (2011). There is no rule mandating the discussion of alternatives in an EAW. *See* Minn. R. 4410.1200 (2011) (discussing the content of an EAW without mentioning alternatives).

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In the EAW, MDNR did not compare the extension to any feasible alternatives. It compared the extension to the current operations at the Minntac facility. The RGU's decision and analysis will be afforded deference if the record provides that the RGU "[has] some concrete idea of what problems may arise and how they may specifically be addressed by ongoing regulatory authority." *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 835. "Although we are not bound by the agency's interpretation of the law, 'an agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature.'" *Matter of Univ. of Minnesota*, 566 N.W.2d 98, 103 (Minn. App. 1997) (quoting *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988)). "We have held that when an agency reasonably interprets a statute, it is the role of the legislature or the supreme court, and not the role of this court, to overrule that interpretation." *Id.*

Relator's argument is based on the fact that the Minntac facility is presently scheduled to close and begin the reclamation process in 2015. Under Minn. R. 6130.4100, subp. 1 (2011), upon deactivation, "[t]he mining area shall be deactivated so that it is nonpolluting, is stable, is free of hazards, minimizes the need for fencing, has current land use and future land use potential which recognizes the needs of the surrounding area, and is maintenance free to the maximum extent possible." However, pursuant to the permit to mine, the operating life of the east and west pits is projected to be at least 70 years from the date of issuance. The "conditions of the permit apply to all mining and reclamation activities conducted from August 25, 1980 until the ores

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identified in the permit application are depleted." According to respondent/intervenor U.S. Steel, "[a]s of December 31, 2012, the Minntac facility had mineral reserves of 557 million short tons. The total production for the year 2012 was 15.6 million tons." Additionally, according to the EAW,

> [a]lthough no extension beyond the proposed project is currently foreseeable, it is likely that there are additional ore reserves in the adjacent surrounding area that could be mined after mining of the proposed extension area is completed. The potential for additional extension of the mine pit would be subject to the economic feasibility of ore mining.

Thus, the Minntac facility could be expanded or extended in the future. Although relator analogized the extension to a new mining project based on the 2015 reclamation date, the extension is more properly considered an expansion of the current mining operations. *See* Minn. R. 4410.4300, subp. 11B (explaining that an EAW must be prepared for project expanding a current mine site by 320 acres or more). Because it is an expansion and there is no mandatory EIS requirement, there is no requirement that MDNR discuss alternatives to the proposal.

We conclude that MDNR's determination that it did not need to assess alternatives in the EAW is a reasonable interpretation of the applicable statute. The statute requires the RGU to determine whether a proposed government action will result in significant environmental effects; it does not require the RGU to compare the proposed action with alternatives or potential future actions. *See* Minn. Stat. § 116D.04, subd. 2a.

Additionally, relator argues that MDNR's finding that the extension does not have the potential for significant environmental effects is a "danger signal" that MDNR did not

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take a "hard look" at the issues in this case. We disagree. Relator relies on two federal cases to show that an EIS is needed because of the extension's significant environmental impact; *Diné Citizens Against Ruining our Env't v. Klein*, 747 F.Supp.2d 1234, 1250-53 (D. Colo. 2010) and *W. Watersheds Project v. Rosenkrance*, No. Civ. 04-443-E-BLW, 2005 WL 1076098 (D. Idaho May 6, 2005). Neither case is applicable here. In *Diné*, the Office of Surface Mining's (OSM) determination that an EIS was not required was not arbitrary and capricious even though OSM guidelines stipulated that an EIS would normally be prepared for a mining operation of the proposed magnitude. 747 F.Supp.2d at 1253. *In W. Watersheds*, the EAW did not comply with the National Environmental Policy Act, and therefore did not show whether the proposal had any potential significant environmental effects. 2005 WL 1076098 at *6. In this case, relator does not argue that there is a specific guideline requiring an EIS for this type of proposal or that the EAW failed to comply with MEPA.

MDNR's record in this matter is more than 6,000 pages long and includes an EIS from 2004, which covers information on water quality in the watersheds at issue. MDNR acquired numerous studies and reports in order to determine whether the extension has the potential of causing significant environmental effects. MDNR also sought information from state and federal agencies and reviewed this information in making its determination. After reviewing the record and specifically responding to the approximately 200 comments received, MDNR applied the standards set forth in Minn. R. 4410.1700 (2011) and determined that any potential environmental effects are subject to mitigation by ongoing public regulatory authority.

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The permitting and SOC requirements specifically designed to address water-quality concerns include the following: the 2010 installation of a seep-collection-and-return-system on the east side of the tailings basin, the SOC requirement that U.S. Steel address source reduction of sulfate through the use of dry air pollution controls, the implementation of an alternative water source lower in sulfate for the make-up water system, the installation of monitoring wells, the development of a groundwater model to address the tailings basin's effect of groundwater quality, the requirement that U.S. Steel submit a Groundwater Sulfate Reduction Plan, and a mass balance of water and sulfate in the tailings basin. Therefore, MDNR's determination was not arbitrary and capricious.

II.

Relator next argues that MDNR's conclusion that Minntac's NPDES permit and permit to mine are reliable mitigation measures is not supported by substantial evidence in the record. MDNR determined that, based on the record, the potential environmental effects of the extension "will be limited in extent, temporary, or reversible, or otherwise not significant." MDNR based this decision, in part, on the fact that ongoing regulatory authority will mitigate any potential environmental effects.

An RGU must consider "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority." Minn. R. 4410.1700, subp. 7C. "When an RGU considers mitigation measures as offsetting the potential for significant environmental effects under Minn. R. 4410.1700, it may reasonably do so only if those measures are specific, targeted, and are certain to be able to mitigate the environmental effects." *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 835. "[A]n RGU may

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not rest its EIS determination decision on mitigation that amounts to only vague statements of good intentions." *Id.* at 834 (quotations and citation omitted). Pre-existing regulatory oversight is a proper means of preventing significant environmental effects before they occur. *Friends of Twin Lakes*, 764 N.W.2d at 382.

A. NPDES Permit

The NPDES Permit at issue regulates seepage through the tailings basin. Relator first argues that the NPDES Permit is not a proper means of mitigating environmental effects because it does not limit the discharge of most pollutants discharged from the tailings basin. Relator relies on an EIS completed in 2004 to argue that there are "17 pollutants of concern that are likely discharged from the tailings basin."

Although these pollutants may currently be present in the tailings basin, relator has not shown that the extension will have the significant environmental effect of increasing discharges of these pollutants. The record also does not support this contention; the EAW does not state that the extension will increase the discharge of these pollutants. It does mention the sulfate issue at length, but states that "[b]ecause production rates will remain the same, potential future increases in sulfate levels of the tailings basin are not anticipated."

Furthermore, the record indicates that of these 17 "pollutants of concern" nine were labeled as "trace or minor constituents." The MPCA described pH, specific conductance, total suspended solids, dissolved oxygen, and alkalinity as "[c]hanges in general water quality parameters." The 2004 EIS focuses on sulfate, chloride, hardness, and total dissolved solids, not 17 pollutants of concern. MPCA addressed these

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discharges by implementing the 2011 SOC. The record also contains the Sandy Lake and Little Sandy Lake Monitoring Report, which states that "[s]ample analysis indicated generally declining levels of several parameters including alkalinity, chloride, total dissolved solids, specific conductance, and sulfates moving downstream through the system."

Relator also argues that the NPDES permit does not adequately regulate sulfate and hardness because it currently has a "no net increase" requirement rather than an "effluent limitation" requirement. The current NPDES permit for the tailings basin contains effluent limitations for oil and grease, pH, and total suspended solids, and requires U.S. Steel to monitor levels of several other pollutants. Similarly, the SOC is being used to obtain compliance with the "no net increase" provisions for sulfate and hardness and to collect information to determine the appropriate effluent limitations for the reissued permit.

Relator relies on *Trout Unlimited, Inc. v. Minn. Dep't of Agric.*, 528 N.W.2d 903 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995) to support its argument that the NPDES permit does not sufficiently mitigate the potential environmental effects that the extension may cause. In *Trout*, this court held that the RGU's decision that an EIS was not needed was arbitrary and capricious because the "project would go forward without an EIS and in the event significant environmental effects did occur, the [RGU] would then rely on monitoring or restrictive permitting procedures to reduce or eliminate those deleterious effects." *Id.* at 909. This court determined that relying on future reactive regulatory efforts instead of conducting an environmental assessment constituted error

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and explained its decision to reverse the RGU's determination by stating, "The very purpose of an EIS, however, is to determine the potential for significant environmental effects *before* they occur. By deferring this issue to later permitting and monitoring decisions, the [RGU] abandoned [its] duty to require an EIS where there exists a potential for significant environmental effects." *Id.* (quotation omitted) (emphasis in original).

This is not a situation in which MDNR failed to examine the potential environmental effects of the extension and deferred the issue to monitoring and permitting to *identify* the significant impacts. Instead, it discusses the regulations now in place to mitigate these impacts before they occur. Based on the analysis below, MDNR's conclusion that the NPDES permit and the SOC effectively mitigate any potential environmental effects is supported by substantial evidence in the record.

Next, relator questions the validity of the expired NPDES permit and argues that the NPDES permit cannot be used as a mitigation measure for potential environmental impacts because Minntac cannot comply with the permit. Under Minn. R. 7001.0160 (2011),

> A person who holds an expired permit . . . and who has submitted a timely application for reissuance of the permit may continue to conduct the permitted activity in accordance with the terms and conditions of the expired permit until the agency takes final action on the application unless the commissioner determines that any of the following are true:
> . . .
> the permittee is not in substantial compliance with the terms and conditions of the expired permit or with a stipulation agreement or compliance schedule designed to bring the permittee in compliance with the permit.

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The Minntac facility is not in compliance with chapter 4, sections 3.1 and 3.2 of the NPDES permit. Based on this noncompliance, Minntac and MPCA entered into an SOC, which is currently being implemented. However, Minntac has applied for a reissued permit and is in substantial compliance with the SOC. Thus, it may operate under the expired permit.

Based on the permitting requirements and the SOC, there is substantial evidence in the record to support MDNR's determination that the significant environmental effects of the extension "will be limited in extent, temporary, or reversible, or otherwise not significant," and will be mitigated by the NPDES permit. Since 2004, MPCA has taken steps to reduce discharges from the tailings basin, including implementing the 2011 SOC. In 2006, Minntac installed a "wet scrubber air control system" to comply with new standards for particulate air emissions. MDNR found that the installation of the system increased the levels of hardness and sulfate in the tailings basin between 2006 and 2012. Due to concerns that the contribution from the wet scrubber system was increasing sulfate levels in the tailings basin, MPCA amended the NPDES permit in 2007 to allow for the construction of a treatment system for the scrubber water and for the discharge of the scrubber water from this treatment system to the tailings basin.

MDNR also determined that the NPDES permit mitigates environmental effects because the 2011 SOC is addressing noncompliance issues at the tailings basin. This determination is supported by the record. Minntac entered into SOCs with MPCA to address elevated levels of hardness and sulfate in the tailings basin. In 2010, Minntac installed a seep-collection-and-return-system on the east side of the tailings basin, which

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collects the surface and shallow subsurface seepage and returns it to the basin. Based on monitoring results from the Sandy and Little Sandy lakes, sulfate levels have decreased since the installation of the system on the east side of the tailings basin. Due to this success, another system is set to be constructed on the west side of the tailings basin to eliminate seepage discharges in the Dark River. Furthermore, the record indicates that levels of chloride, total dissolved solids, and specific conductance have declined since the system was installed.

Additionally, MDNR determined that the NPDES permit is an adequate mitigation measure because

> [m]onitoring wells have been installed and the company is in the process of developing a groundwater model as required by the SOC to address the tailings basin's effects on groundwater quality. The results of the groundwater monitoring will be used in permitting efforts to develop a target concentration in the tailings basin necessary to meet groundwater standards at the property boundary.

Therefore, MDNR determined that this is an adequate mitigation measure.

These determinations are supported by the record. The amendment to the June 2011 SOC required that Minntac install monitoring wells at the eastern property boundary. The monitoring wells are also used to collect data to determine the maximum concentration of sulfate that can be maintained in the tailings basin to ensure compliance with applicable water quality standards. After installation, the monitoring wells showed that Minntac violated the sulfate groundwater standard. The goal of the amendment to the SOC is to reestablish compliance with the sulfate standard as soon as possible. The monitoring wells were installed to meet this goal.

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The SOC also requires U.S. Steel to submit an application for the installation of the Dry Controls Project on one of its taconite production lines to replace the current wet scrubber system. This will address the increased sulfate and water hardness in the tailings basin. The first dry emission control installation is expected to be completed in 2014. By replacing wet scrubbers with dry emission controls, the amount of pollutants passing through the tailings basin will be reduced.

Additionally, U.S. Steel submitted a Dry Controls Effectiveness Report to MPCA pursuant to the terms of the SOC. The report described the projected effectiveness of four dry-control systems and the east and west side seep-collection-return systems. It states that the tailings basin sulfate concentration will decrease from a peak of over 1,000 mg/L in 2014 to under 500 mg/L by 2032. Lastly, the SOC requires the submission of an Alternate Makeup Water Report, which refers to the water used for taconite processing in addition to the water taken from the tailings basin. The new source of makeup water should reduce the sulfate levels in the tailings basin. U.S. Steel submitted this report, and MPCA approved the project. Because the SOC is designed to reduce seepage discharge from the tailings basin, we conclude that MDNR's determination that the NPDES mitigates the environmental impacts of the proposal is supported by sufficient evidence in the record.

B. Permit to Mine

Relator claims that Minntac's permit to mine cannot act as an ongoing public regulatory authority sufficient to avoid a positive EIS determination because it does not prevent water pollution at the site and MDNR has not shown how it will do so in the

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future. Relator contends that the permit to mine is simply a "vague statement of good intentions," not a specific and targeted measure certain to mitigate the environmental effects. *See Citizens Advocating Responsible Dev.*, 713 N.W.2d at 835.

Relator relies on *Dead Lake Ass'n. v. Otter Tail Cnty.*, to support its argument. A04-0717, 2005 WL 221773 (Minn. App. Feb. 1, 2005), *review denied* (Minn. Apr. 27, 2005). This case is unpublished and therefore not binding on this court. Minn. Stat. § 480A.08, subd. 3 (2012) ("Unpublished opinions of the Court of Appeals are not precedential."). In *Dead Lake*, the appellant argued that the county erred by not requiring an EIS for a proposed development project. *Dead Lake*, 2005 WL 221773, at *1. Government agencies expressed concern about the proposed action and highlighted issues that the EAW did not address. *Id.* at *1-2. The county determined that it could mitigate any significant adverse effects by implementing MDNR's boating recommendations and by using its concurrent authority with MDNR to "mitigate the environmental effects of boating through their ongoing regulatory authority to enact boating restrictions on the lake." *Id.* at *5 (quotations omitted).

Dead Lake is not directly analogous to this case. The county in *Dead Lake* failed to explain how it would implement the boating regulations and the EAW did not include any information about boat traffic. *Id.* at *6. The court concluded that the county's reliance on this mitigation measure was arbitrary and capricious "when the effects of the increased boat usage had not yet been adequately addressed." *Id.*

Here, the EAW addressed the effect of the proposal on water quality. The record contains ample information about the water quality in the watersheds surrounding the

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Minntac facility. MDNR determined that an amendment to the permit to mine will contain special conditions to address water quality. This amendment is required for the extension to occur.

This determination is supported by the record. "[T]he forthcoming Permit to Mine Amendment will include discussion of measures to prevent or minimize potential environmental problems associated with the proposed extension and roadway relocations related to geology or soil conditions," and "[m]ethods of stockpiling, volumes, and stockpile locations will be addressed." Furthermore, MDNR determined that measures including covering the tailings basin dike and water treatment may be included in the permit to mine to address water quality concerns.

Relator also claims that the reliance on the permit to mine as a mitigation measure is a vague statement unlikely to mitigate any significant environmental effects. It notes, "[I]t is not sufficient for an RGU to release an EIS determination stating that it did not bother to investigate environmental effects because it was confident it could later pass regulations if any environmental harm occurred." *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 834-35. "The RGU must have some concrete idea of what problems may arise and how they may specifically be addressed by ongoing regulatory authority." *Id.* at 835.

MDNR has the authority to modify or revoke the permit to mine if it is necessary to protect the public health or safety, or to protect the public interests in lands or waters against injury. Minn. Stat. § 93.481, subd. 4(c) (2012). MDNR determined that

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> [o]ngoing public regulatory authority from . . . MDNR's permit to mine will monitor discharges from the tailings basin to determine the success of proposed measures and to implement additional measures if needed . . . The Groundwater Sulfate Reduction Plan required as part of the SOC Amendment will evaluate treatment technologies; the result of these evaluations will inform the MDNR Permit to mine and NPDES reissuance.

Moreover, "[w]hen MPCA re-issues the NPDES permit, if new water quality standards are applied, then [M]DNR will open the permit to mine and amend it if a change in the closure plan is needed in order to protect the affected resource."

MDNR has a concrete idea of what water-quality issues may arise; in fact, it is monitoring the tailings basin to specifically identify these issues and their cause. Once the water-quality issues are identified, the permit to mine will be amended, as required by the extension proposal, to implement treatment technologies, such as covering the tailings basin dike and treating tailings basin water. Because MDNR is the RGU in this matter, it is able to implement specific procedures to mitigate any significant environmental effects.

III.

Relator claims that this court should give minimal deference to MDNR's determination that EIS is not required because MDNR has an inherent conflict of interest that prevents it from taking a "hard look" at the environmental consequence of the extension.

"It is the policy of the state to provide for the diversification of the state's mineral economy through long-term support of mineral exploration, evaluation, environmental

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research, development, production, and commercialization." Minn. Stat. § 93.001 (2012). MDNR has the duty of administering the School Trust Fund, which receives money from taconite mining. Minn. Stat. § 84.027, subd. 18(a) (2012) ("The commissioner of natural resources has the authority and responsibility for the administration of school trust lands under sections 92.121 and 127A.31."). To effectuate this duty, MDNR must "secure the maximum long-term economic return from the school trust lands consistent with the fiduciary responsibilities imposed by the trust relationship established in the Minnesota Constitution, with sound natural resource conservation and management principles, and with other specific policy provided in state law." Minn. Stat. § 127A.31 (2012).

MDNR is also the principal regulator of mining activities in Minnesota. *See* Minn. Stat. § 93.47, subd. 1 (2012); Minn. R. 6130.4200, subp. 1 (2011). Under MEPA, MDNR is the RGU for all environmental review of mining operations. Minn. R. 4410.4300, subp. 11; Minn. R. 4410.4400, subp. 8 (2011). Relator claims that this statutory scheme creates an inherent conflict of interest preventing MDNR from properly discharging its duties due to the risk that MDNR will attempt to minimize environmental impact and that its financial interests will predominate.

Relator relies on *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115, 128 S. Ct. 2343, 2350 (2008) to argue that, when a conflict of interest exists at the agency level, the court should take it into account on judicial review. In *Metro Life*, the participant brought a suit under the Employee Retirement Income Security Act (ERISA) to contest the administrator's termination of her disability benefits on the grounds that she was no

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longer totally disabled. *Id.* at 109, 128 S. Ct. at 2347. The Supreme Court decided that the role of an entity as an ERISA plan administrator and payer of plan benefits creates a conflict of interest and "that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits." *Id.* at 108, 128 S. Ct. at 2346.

Metro Life is not applicable to the case at hand. It deals with a private company and the dual role of an insurance company to administer and fund an employee benefit plan. *Id.* at 112-13, 128 S. Ct. at 2348-49. In this case, the legislature has determined that it is appropriate for MDNR to balance these interests, and we will defer to that decision. *See Minneapolis Teachers Ret. Fund Ass'n v. State*, 490 N.W.2d 124, 131 (Minn. App. 1992) ("It is not within the power of this court to second guess the policy determinations of the legislature.").

Affirmed.

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